Editor's note: Appealed – aff'd, Civ. No. 80-95-BLG (D. Mont. May 15, 1981), aff'd No. 81-3314 (9th Cir. Aug. 4, 1982)

MARY C. PEMBERTON

IBLA 78-522 Decided November 22, 1978

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting color of title application M-40120.

Set aside and hearing ordered.

1. Color or Claim of Title: Generally

   Where record does not show any instrument purporting on its face to convey the disputed land not later than Jan. 1, 1901, appellant has not made out a meritorious class 2 color of title claim.

2. Color or Claim of Title: Generally--Color or Claim of Title: Good Faith

   A grantor's quitclaim deed may be, if other requirements are met, sufficient to invest a grantee with color of title to the lands purportedly conveyed.

3. Color or Claim of Title: Generally--Color or Claim of Title: Description of Land--Color or Claim of Title: Good Faith

   Instrument of conveyance upon which claimant relies is sufficient to provide color of title only if it describes land conveyed with such certainty that boundaries and identity of land may be ascertained.

4. Color or Claim of Title: Generally--Color or Claim of Title: Description of Land--Color or Claim of Title: Good Faith

   Extrinsic evidence may be introduced in color of title proceeding to make definite

a description in a deed which is latently ambiguous as to what lands were conveyed.

APPEARANCES: Rodney J. Hartman, Esq., Hutton and Cromley, Billings, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Mary C. Pemberton has appealed a June 6, 1978, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting her color of title application M-40120 to purchase a parcel of land situated in Lot 18 of sec. 26, T. 9 S., R. 14 E., Montana principal meridian, in Park County, Montana. Under the Color of Title Act, 43 U.S.C. § 1068 et seq. (1970), Congress has allowed for the purchse of Federal lands by certain classes of persons holding what appears to be valid title to land, but is not in fact good title. See also 43 CFR Part 2540.

The 1.48-acre parcel in issue is a part of a 4.90-acre tract located on September 23, 1886, as the "September Millsite," which was also identified as "Survey 66B" in survey No. 66 for Mineral District No. 2, plat approved by the U.S. Surveyor General for Montana on November 15, 1887. Title to the other 3.42 acres within the total 4.90-acre tract is not in dispute here.

Patent No. 17923 was issued for the "September Millsite," inter alia, on May 22, 1891, to four persons–Harry Gassert, Jacob Reding, William H. Randall, and Madison M. Black. The following reservation is noted in the patent:

> Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said Nevada King Millsite claim, and granted premises in said Lot No. 66B containing 3 acres and 42 hundredths of an acre, which together with the area embraced on said lot No. 66A, aggregates 24 acres and .08 of an acre of land, more or less.

It is not disputed that actual title to the 1.48-acre parcel in issue was not granted under the 1891 patent to appellant's predecessors in interest. We note that the "September Millsite" conveyed in the patent is only the 3.42 acre tract not contested here.

The land in issue was withdrawn as part of the Absaroka Forest Reserve on September 4, 1902, by Proclamation No. 39, and has been continuously withdrawn since then. 1/ The abstract of title submitted

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1/ Effective July 1, 1945, these lands were designated part of the Gallatin National Forest by PLO 305 (11 FR 249, December 18, 1945).

by appellant indicates, however, that prior to this withdrawal--on June 12, 1902--one Adam Gassert conveyed by quitclaim deed his interest in the "September Millsite" to one M. B. Strong. The effect of this conveyance is discussed infra. Where an applicant's class 1 color of title claim is based upon a chain of title which was initiated prior to the withdrawal of subject lands, the withdrawal will not prevent the patenting of such lands to the applicant. Myles Stephenson, 16 IBLA 252 (1974); Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).

Appellant acquired the lands in issue under an October 9, 1952, general warranty deed passing the "September Mill Site, Mineral Survey No. 66B," from Hoosier's, Inc., to W. H. Pemberton, appellant's husband. On February 9, 1966, W. H. Pemberton conveyed the same property to his wife and himself as joint tenants with right of survivorship. Appellant has not indicated the status of W. H. Pemberton in this matter. In her application, Mary C. Pemberton averred that she first learned that she did not have clear title to the disputed land in 1973.

The State Office rejected appellant's color of title application because:

> 1. The patent on September Millsite, No. 17923 issued May 21, 1891, specifically exempted the land embraced in the Nevada King Millsite and the documents furnished with your application show your title originates from the patentee's. * * *
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> 2. The documents furnished with the application fail to specifically identify the land that was exempted from the patent; in fact in some cases, they refer to the patent for a complete description or even indicate September Millsite (Patented).
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> 3. The lands were withdrawn for the Absaroka Forest Reserve on September 4, 1902. Any ambiguity of description that developed after that date could not be the basis for a color-of-title claim because the Act does not apply to reserved public land.

In her statement of reasons, appellant rests her color of title claim upon several maps compiled by the Surveyor General and other Federal and local officials between 1888 and the 1960s which she alleges depict the September Millsite as including 4.90 acres. Appellant further contends:

> [A] quit claim deed dated June 12, 1902, before creation of the Absaroka Forest Reserve becomes crucial. It

> conveys land as described in the Surveyor General's map mentioned above. 4.90 acres were involved.
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> Appellant adequately established color of title and therefore the Lands Adjudication Section was in error when it denied appellant's color of title application.
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> * * * There is no question that appellant and predecessors before the 1902 Absaroka reservation have occupied the 1.48 acres in good faith and in peaceful, adverse possession. This type of occupation unquestionably has existed for longer than twenty years. Moreover, property taxes were always assessed and paid on a 4.90 acre basis. The lands adjudication section has assiduously avoided addressing this issue. In short, every required element of Title 43 § 1068 is present in this case.

Brief for appellant, p. 2.

To qualify for the Department's consideration of her color of title application under a class 2 claim, 2/ an applicant and her predecessors in interest must have held the subject lands "under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied by State and local governmental units, * * *." 43 U.S.C. § 1068 et seq. (1970). While appellant has made a showing as to tax payments on a unit described as the "September Mill Site 66-B," she has not shown that a predecessor in interest acquired good faith color of title to the 1.48-acre tract in issue "not later than January 1, 1901." The sine qua non of a color of title claim is an instrument which on its face purports to convey the tract in question. See Mable M. Farlow, 30 IBLA 320, 84 I.D. 276 (1977); Estate of James J. Lee, Deceased, 26 IBLA 102 (1976); Cloyd and Velma Mitchell, 22 IBLA 299 (1975). Appellant has directed us to no instrument effective as of January 1, 1901, upon which a predecessor in interest to appellant could have assumed color of title to the parcel of land in issue. The abstract of title in the record discloses only one pre-1901 conveyance arguably touching the disputed tract--a December 18, 1893 deed from M. M. Black and Rosa G. Black to William N. Nevitt.

[1] This 1893 deed is ambiguous as to whether it conveyed the Black Warrior Mill Site or Lot 66B -- the September Millsite -- but it is

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2/ Class 1 applications are those filed under subparagraph (a) of 43 U.S.C. § 1068 et seq. (1970). Class 2 applications are submitted pursuant to subparagraph (b) of that Code section. See 43 CFR 2540.0-5(b).

crystal clear that it does not convey the 1.48 acres in dispute in the instant case because this deed expressly states that "for full description See Patent from U.S." As we have noted above, the 1891 patent on its face excludes the 1.48 acres in issue from its grant. Since the reference in the 1893 deed to the 1891 patent gave William N. Nevitt reason to know that title to this tract remained in the United States, Nevitt cannot have held good faith color of title to the subject tract, and appellant cannot bottom a class 2 color of title claim upon the December 18, 1893 deed. See Joe Stewart, 33 IBLA 225, 229 (1977). There being in the record no other instrument purporting on its face to convey the disputed lands effective not later than January 1, 1901, we conclude that appellant has not made out a meritorious class 2 color of title claim, even assuming arguendo that she could prove the other class 2 requirements and persuade the Department to exercise its discretion in her favor. E.g., see Hamel v. Nelson, 226 F. Supp. 96 (D. Cal. 1963); Gladys Lomax, 29 IBLA 146 (1977).

We turn now to consider whether appellant has alleged facts which, if proved, would entitle her to purchase the disputed tract on the basis of a class 1 color of title claim. First, "a color of title claim arises only when there is failure to [sic] actual title." H. F. Gerbaz, 77 I.D. 59, 65 (1970). To have a valid claim, an applicant need only have a "good faith * * * claim or color of title" and meet certain other criteria given in 43 U.S.C. § 1068 et seq. (1970). In Mable Farlow, supra, a 1904 patent from the United States to the applicant's predecessor in interest expressly referred to an 1883 survey which indicated a "Lot 5" situated entirely to the east of a river. The color of title application was for certain lands west of the river, based upon the claimant's allegation that "all of the public records show lot 5 as including land on both sides of the river with the exception of the erroneous 1883 survey plat." We remanded the case to allow appellant a hearing to consider whether other public records introduced by the appellant did give a proper basis for good faith color of title to the disputed tract. The Department's decision in William F. Trachte, A-29260 (June 7, 1963), is of similar import.

To establish a class 1 claim, appellant here must at a minimum show that good faith color of title arose in behalf of a predecessor in interest prior to September 4, 1902, the date on which the land in dispute was withdrawn for inclusion in the Absaroka Forest Reserve, as discussed, supra. The Department must reject an application based on color of title initiated after the subject land has been withdrawn from the operation of the public land laws and has been reserved as national forest land. Ben J. Boschetto, 21 IBLA 193 (1975); Sylvan A. Hart, A-30832 (December 1, 1967).

[2] Appellant has directed our attention to the June 12, 1902, deed from Adam Gassert to M. B. Strong as a valid predicate for good

faith color of title in appellant's predecessors in interest. 3/ That deed, which is captioned "Quit Claim Deed," says:

> Remise, release and forever quitclaim, the following described real estate situated in the County of Park and State of Montana, to-wit:
>
> All his right, title and interest of every nature and description in and to the following described property:
>
> * * * Also all his right, title and interest in and to the September Millsite, designated by the Surveyor General as Lot ___, Survey ____, new World Mining District, Park County, Montana.
>
> Together with all the tenements, hereditaments and appurtenances unto the property thereof, and also all the estate, right, title, interest in the above described property.
>
> To Have And To Hold, all and singular, the said premises, with the appurtenances and privileges unto the party of the second part, her heir and assigns forever.

See Abstract of Title in record. The Department has held that a grantor's quitclaim deed may be, if other requirements are met, sufficient to invest a grantee with color of title to the lands purportedly conveyed. See Ivie G. Berry, 25 IBLA 213 (1976); Harold R. Leet and Irma W. Leet, Sacramento 080068 (May 14, 1968). 4/

The problem with the June 12, 1902, deed, however, is that it describes the land conveyed only as "the September Millsite." Without a legal description in metes and bounds or an incorporation by reference of a specific plat approved by the Surveyor General, the deed on its face does not give any indication as to whether Adam Gassert intended to quitclaim a "September Millsite" of 3.42 acres

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3/ Aside from the June 12, 1902, deed and the December 18, 1893, deed, considered supra, only one other prewithdrawal conveyance is indicated in the abstract of title, a March 11, 1902, deed from William M. Nevitt to Charles Nevitt. This conveyance is insufficient to give color of title for the same reason the December 18, 1893, deed was inadequate.
4/ Affirmed upon appeal to the Secretary, Harold R. Leet and Irma W. Leet, A-31012 (May 27, 1969).

as described in the 1891 patent, or a "September Millsite" of 4.90 acres which included the 1.48 acres in issue in this proceeding.

[3, 4] The instrument of conveyance upon which a claimant relies is sufficient to provide color of title only if it describes the land conveyed with such certainty that the boundaries and identity of the land may be ascertained. See Elsie V. Farington, 9 IBLA 191, 194-96 (1973), appeal dismissed with prejudice, Civil No. S 2768 (E.D. Cal. December 5, 1973); Harold R. Leet and Irma W. Leet, supra; Nora Beatrice Kelly Howerton, 71 I.D. 429 (1964). In Bryan N. Johnson, 15 IBLA 19 (1974), a quitclaim-type conveyance was held not to confer color of title because it failed specifically to describe the property to be passed. Extrinsic evidence, however, may be introduced to make definite a description in a deed which is latently ambiguous as to what lands were conveyed. See Mable Farlow, supra. In Farlow, the chain of title contained several conveyances of a "Lot 5," and this Board remanded the case for a determination of "whether the deeds were based upon such other plats and records which should be read together with the deeds as creating a color of title" to the subject lands. 30 IBLA at 329.

The record in this case includes a survey plat approved by the U.S. Surveyor General for Montana on November 15, 1887. This plat notes that the area of Survey 66B was 4.90 acres, but it further notes that 1.48 of those acres were in conflict with the Nevada King Mill Site. These were the 1.48 acres which were excluded in the 1891 patent, and which are the subject of this appeal. This Board has held that good faith under-the Color of Title Act requires that a claimant -- or in this case her predecessor -- honestly believed that there was no defect in his title and that the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to him. See Minnie E. Wharton, 4 IBLA 287, 295-96 79 I.D. 6 (1972), rev'd on other grounds sub nom. United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); Lawrence E. Willmorth, 32 IBLA 378 (1977). The conflict indicated on the November 15, 1887, survey plat apparently gave M. B. Strong, the grantee under the June 12, 1902, deed, reason to know of a potential defect in title to the 1.48 acres in issue here. Thus, we are not prepared, without any briefing on this point, to decide that the 1887 plat rendered Adam Gassert's conveyance describing "the September Millsite," sufficiently certain as to the 1.48 acres as to provide M. B. Strong with good faith color of title to that parcel. This does not mean, however, that appellant should be barred from arguing the effect of the November 15, 1887, plat at the hearing on remand.

In her statement of reasons, appellant refers to an "1888 Surveyor General's map showing September Millsite 66B to be a square consisting of 4.90 acres." In a May 1, 1978, letter to Edgar D. Stark of the BLM, counsel for appellant directed attention to Surveyor

General maps dated 1891 and 1892. None of these maps is included in the record, and there is no indication that the BLM weighed such evidence in rejecting appellant's color of title application. Under the circumstances of this case, appellant is entitled to a hearing at which evidence can be adduced and arguments made as to the meaning of maps, plats, etc., for color of title purposes, and where consideration may be given to whether or not such documents created a good faith color of title in M. B. Strong, Adam Gassert's grantee and appellant's predecessor in interest.

Accordingly, we order that this case be referred to an administrative law judge for a fact-finding hearing under 43 CFR 4.415. The administrative law judge may consider not only the specific issues argued in this appeal, but also whether other requirements of the Act, such as cultivation or valuable improvements and continuous good faith possession by appellant and her predecessors in interest, have been satisfied. We note that the burden of proving a valid color of title claim is upon the applicant. 43 U.S.C. § 1068 et seq. (1970); Joe I. Sanchez, 32 IBLA 228 (1977); Mable Farlow, supra. Appellant must at a minimum show that the documents or records she introduces gave M. B. Strong justifiable reason or a reasonable basis to believe he had good title to the disputed 1.48 acres. E.g., S. V. Wantrup, 5 IBLA 286 (1972); Hugh Manning, A-28383 (August 18, 1960); Minnie E. Wharton, supra.

Since, as we have noted above, color of title in the disputed tract must have been initiated prior to the September 4, 1902, withdrawal of the lands for inclusion in the Absaroka National Forest, there is no need to consider maps, plats, or other extrinsic evidence effective subsequent to the June 12, 1902, deed offered in support of appellant's position. This, of course, does not mean that the BLM may not show by such later evidence that the chain of color of title was broken during the tenure of an intermediate predecessor of appellant. Under the circumstances of this case, we believe, without deciding, that good faith possession must have been continuous after the June 12, 1902, conveyance in order for appellant now to have a valid claim, since the 1902 withdrawal would have become effective in the event of a break in good faith possession under color of title.

Our ordering a hearing should not be deemed by the parties as a bar to their entering into such stipulations as they consider proper for submission to the administrative law judge.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision appealed from is set aside and the case is referred to the Hearings Division under 43 CFR 4.415 for appropriate action.

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Anne Poindexter Lewis
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Frederick Fishman
Administrative Judge